SUPREME COURT OF THE UNITED STATES.

NOVEMBER TERM, 1901, No. 403.

LOUISA V. KIDD, AS EXECUTRIX OF THE WILL OF H. B. TULANE, DECEASED,

Plaintiff in error,

v.

THE STATE OF ALABAMA,

Defendant in error.

ARGUMENT OF W. A. GUNTER

FOR THE PLAINTIFF IN ERROR IN THE ABOVE AND A SIMILAR CASE, WHEREIN LOUISA V. KIDD, INDIVIDUALLY, IS PLAINTIFF IN ERROR, SUBMITTED UNDER AGREEMENT OF COUNSEL ALONG WITH THIS CASE AND TO ABIDE THE RESULT THEREIN.

STATEMENT OF THE CASE.

This case comes up on a writ of error to the Supreme Court of Alabama in a suit to collect back taxes against the appellant, as executrix, for five years prior to the assessment, on certain stocks held by her in her representative capacity in certain railroad corporations located and doing business outside of the State of Alabama, which it was claimed were not taxed, or, if taxed, that the law was unconstitutional, because similar shares in domestic corporations and of foreign corporations doing business in the State of Alabama were exempt.

FACTS.

The two cases to which the brief applies were twice before the Supreme Court of Alabama. The first report of the case is in 28 So. Rep. 480. On the last appeal no opinion was pronounced, but the case was affirmed on the authority

of the previous decision. See decree of affirmance, page 15 of the Record.

In the first trial in the Circuit Court, to which the case had been appealed from the Court of County Commissioners and heard *de novo*, it was held that the tax was invalid; but, on appeal, the Supreme Court overruled all objections of every kind. 28 So. Rep., *supra*, and sent the case back for a new trial to the Circuit Court.

On the second trial in that court there was a judgment for the State which was affirmed on appeal, as above stated.

Tulane, the testator of plaintiff in error, was a citizen of Alabama and was possessed of a large amount of stocks in foreign corporations doing no business in Alabama. The amount of such stocks was $1,007,500. See Record, page 9. Tulane died in 1897, and in 1898 his estate was taxed on these stocks for the preceding five years. It was admitted that no taxes had been paid upon these stocks, and that the corporations in which they were held were located in other States than Alabama, and that during the years for which the taxes are claimed they did no business in Alabama and had no property therein and gave in none for taxation, and that said corporations were all railroad companies. Record 9.

The only question in the case is the validity of the taxation of these shares under the XIVth amendment of the constitution of the United States. The point was raised by pleas, as well as by charges given and asked.

ASSIGNMENT OF ERRORS.

The plaintiff in error makes the following assignment of errors:

1. The court erred in sustaining the demurrer to the first plea of the plaintiff in error which is in these words:

"1. That her said testator in his life-time, and she as his executrix after his death, which occurred in October, 1897, regularly gave in for assessment for each of the years for which taxes are now

claimed in said complaint all of the property belonging to the said Tulane during his life and to his estate after his death, in the State of Alabama, which was taxed by the laws of Alabama, except the shares of the capital stock of railsoads owned by said Tulane in his lifetime, and belonging to his estate after his death, which said railroads were and are corporations created by and located in other States than the State of Alabama, and which did not extend into Alabama, and which did no business in Alabama during any of said years. And that taxes were duly assessed against the property so given in, and paid by said Tulane in his lifetime and by defendant since his death. And defendant says that all of said taxes now claimed of her are for and on account of said shares in said railroads so owned by said Tulane in his lifetime and by his estate after his death and not given in for assessment. That said Tulane was, during his life, a resident and citizen of the State of Alabama, and that defendant is also a resident and citizen of said State.

Defendant says that if the laws of Alabama impose the taxes claimed in this suit upon said shares of said railroad companies, the same are illegal and void and violative of the Constitution of the United States and the XIV Amendment thereof, in that there is no similar tax imposed by said laws upon the shares of domestic railroads or upon the shares of foreign railroad companies doing business in the State of Alabama. And defendant claims the benefit of the protection of the Constitution of the United States against the collection of the taxes claimed in this suit."

See Record, pp. 5 and 6.

2. The lower court erred in sustaining the demurrer to the third plea of the plaintiff in error, which is in the following words:

"3. And for further plea in this behalf, defendant says that the claim for taxes for which this suit is brought is in large part for taxes on shares in the capital stock of foreign corporations owned by said Tulane in his lifetime, and by his estate after his death, and which said corporations were not located in Alabama and did no business in Alabama, and the shares in which were not subject to taxation for the years for which taxes are claimed in said complaint, because no similar taxes are imposed upon the shares of like domestic corporations and foreign corporations doing business in the State

of Alabama. And so defendant pleads against the collection of the taxes assessed against her on said shares of foreign corporations, that the laws imposing the same are illegal and void under the Constitution of the United States and the XIV Amendment thereof. And as to other taxes claimed of her in said complaint, she denies each and every allegation of the complaint respecting the same." See Record, p. 6.

3. The court erred in giving at the request of the plaintiff in the lower court the following charge to the jury:

"If the jury believe the evidence in this case, they will find for the plaintiff." See Record, p. 10.

4. The lower court erred in refusing to give to the jury the following written charge asked by the defendant in the lower court, plaintiff in error in this court, to-wit:

"If the jury believe the evidence, they will find for the defendant as to the claim for taxes on shares of foreign railroad companies." See Record, p. 10.

ARGUMENT.

It was insisted to the Supreme Court of Alabama that there was really no law of the State taxing the shares of stock which are the subject of this suit. But the Supreme Court having construed the statutes of Alabama to impose a tax, the only question which we can consider here is the validity of the taxes under the XIVth amendment of the constitution of the United States guaranteeing to citizens the equal protection of the laws. It is insisted that similar shares of stock in domestic railroads and foreign railroads having some property within the State were wholly exempted from taxation, and that, therefore, the law imposing the tax on the shares held by the plaintiff in error was unconstitutional.

By section 451 of the Code of 1886, which governs this case, except the taxes for the year 1897, it is provided that

the following property and persons shall be exempt from taxation:

..... "8. The shares of the capital stock of any company or corporation which is required to list its property for taxation in this State shall not be assessed against the share-holders of such company or corporation."

By Section 494 of the Code of 1886, railroads were required to list their property for taxation. The section provides that

"On or before the first day of April of each year, the president, secretary or auditor of any railroad whose track or road bed, or any part thereof, is in this State.....shall under oath make to the State auditor a return in writing of the total length and value of such railroad, including the right of way, road-bed, side-tracks and main track in this State, and specifying the total length and value thereof in this State, and in each county, city and incorporated town in this State; and also of the number and value of the locomotive engines, and passenger, freight, platform, construction and other cars of such company, and of the average amount and value of merchandise and supplies kept or carried on trains for sale, or other disposition for a profit by such company to employees or other persons in this State, for the year next preceding the return; and such return the auditor shall lay before the State board of assessment at its next meeting thereafter."

By Section 509 of the same Code, it is provided that

"All property, real or personal, belonging to railroad, telegraph, sleeping-car and express companies, which is not required by the provisions of this article to be returned to the auditor, must be returned to the tax assessor of the county in which it is taxable, and by him assessed as other property in the county is returned and assessed."

By Section 453 of the same Code, the subjects and rates of taxation, are stated, so far as pertinent, as follows:

"For the use of this State, and to raise revenue therefor, there is levied an annual tax of 60 c. on each one hundred dollars in value upon the following property.....Clause 9: The capital stock of all corporations, companies or associations created or existing under

any law in force in this State, except such portions of the capital stock as may be invested in property which is otherwise taxed as property, the same to be paid by the corporation, company or association; but when such corporation, company or association pay the taxes in this chapter levied upon the shares into which its capital stock is divided, or the same is paid by the shareholders, such corporation, company or association shall only be required to pay the taxes levied on the real and personal estate owned by it, unless its investments are otherwise herein taxed."

"Clause 11. The road-bed, track and other property, real and personal, of railroads."

"Clause 13. All other property, real and personal, not otherwise specified herein."

By the Code of 1896, which applies to the taxes for the year 1897, in controversy in this case, the exemption is embodied in the tax law by exception.

Section 3911 is as follows:

"For the use of this State and to raise revenue therefor, there is levied an annual tax of 55 c. on each one hundred dollars in value upon the following property:"

Clause 9 of this section:

"Every share of any corporation organized under the laws of this State, or any other State, or of the United States, (other than railroad, telegraph, express and sleeping-car companies, building and loan associations and banks or banking associations, to be assessed and collected in the county wherein such association has its chief or home office in this State, and to be assessed at its actual market value, to the person in whose name such shares stand on the books of the corporation, and not to the corporation."

The remainder of the clause provides a mode of making returns for the collection of taxes provided for in the clause.

Section 13. "The road-bed, track, and other property, real and personal, of railroads, and all tram-roads, pole-roads, canals, ditches, and channels used for transporting lumber, timber, logs or other valuable commodities of commerce, which are not taxed as improvements on the land, or plant, or main property of such tramroads, pole-roads, canals, ditches or channels."

Section 14. "All other property, real and personal, not otherwise specified herein, including cotton, pig-iron, manufactured goods and other things of value."

The only question before the Court, therefore, is, whether clause 13 of Section 453 of the Code of 1886, and clause 14 of Section 3911 of the Code of 1896, above quoted, could consistently impose a regular tax on shares owned by citizens in foreign railroads or other foreign corporations doing no business in Alabama. The point was regularly raised and pressed on the first trial of the case in the lower court, and in the Supreme Court, and the Supreme Court decided it adversely to the plaintiff in error in the case reported in 28 So. Rep., 480, though not expressly referring by name to the Constitution of the United States.

The following is an extract from an argument made to the Supreme Court of Alabama upon the first appeal:

"We now appeal for the same protection to the XIV Amendment of the Constitution of the United States. That section has been too often construed to operate against any substantial inequality in the imposition of public burdens, to need any extended consideration. If it be conceded that the laws in question imposed no taxes on shares in domestic corporations, or allowed certain deductions in cases of domestic corporations, and imposed a tax on the same species of property held in foreign corporations in the one case, or provided for no similar deduction in the case of foreign shares, it would be disrespectful to the court to assume that it was ignorant of the unconstitutionality of such a law, under the XIV Amendment of the Federal Constitution. We therefore merely cite a few of the [illegible] cases, making the application which we now insist on, out of the hundreds cited in the Code of Alabama, page 25:

Gulf C. & S. F. R. Co. v. Ellis, 165 U. S., 150.
Blake v. McCling, 172 U. S., 260–1.
Lake Shore R'y Co. v. Smith, 173 U. S., 205.
Nat. Bank of Wellington v. Chapman, 173 U. S., 205.
Jones v. Brim, 165 U. S., 180.
St. Louis & San. F. R'y Co. v. Matthews, 165 U. S., 1.

It is simply impossible to consistently hold that persons have the

equal protection of the laws, when one must pay taxes on his shares in foreign corporations, while the other is exempt from paying on like shares in domestic corporations or those doing business in Alabama.

On the plainest principles, then, the law in this case, even if it expressly levied a tax on shares in foreign corporations and those doing no business in Alabama, would be violative of the Constitution of the United States."

On the return of the case to the Circuit Court, the deck was cleared for an appeal to this court by the withdrawal of the old pleadings and the filing of new pleas. The judgment entry shown on page 8 of the record is: "This day came the parties by attorneys, and by consent, the pleas of defendant heretofore filed are withdrawn and defendant demurs to the complaint as shown by the record and from demurrers on file, which demurrers being understood by the court, it is considered and adjudged by the court that the demurrer is hereby overruled and held for naught. Thereupon the defendant filed sundry pleas." These pleas are shown on pages 5 and 6 of the record. It is sufficient to say that pleas one and three distinctly raise the question of the validity of the taxation in question under the constitution of the United States, because no similar taxes are imposed upon the shares of like domestic corporations and foreign corporations doing business in the State of Alabama. The lower court sustained a demurrer to these two pleas. See demurrer, Record page 7; judgment on demurrer, Record page 8.

The point was likewise raised upon charges to the jury. The court, at the instance of the defendant in error, charged the jury that if they believed the evidence in this case they would find for the plaintiff, and the plaintiff in error asked the court to give the following charge to the jury: "If the jury believe the evidence, they will find for the defendant as to the claim for taxes on shares of foreign railroad com-

panies," which charge the court refused, and the defendant duly excepted. Record 10.

By section 3840 of the Code of Alabama, which has been in force many years, the Supreme Court is freed from the usual rule that a first decision settles the law of a case. The words of that section as far as pertinent, are: "The Supreme Court, in deciding each case, when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what, in its opinion, at that time, is law, without any regard to such former ruling on the law by it."

So that the court was perfectly free to to make a proper decision on the constitutionality of the law on the second appeal, no matter what its decision was on the first appeal, and if the question had not been raised on the first appeal. But the question was as vigorously pressed upon the first appeal as upon the second.

The following is a copy of a part of a brief submitted to the court upon the last appeal:

LAW POINTS.

It is insisted:

1. That there was no law directing these shares to be taxed.

2. That the law having exempted shares of domestic railroad companies and of foreign corporations doing business in Alabama from taxation, the law taxing the appellant on her shares in foreign corporations doing no business in Alabama is violative of the constitution of Alabama.

3. And for the same reason is violative of the constitution of the United States.

ARGUMENT.

The foregoing law points were all presented to the court on the former appeal and ruled against the appellant, but there being no right to appeal from the judgment of this court, which was one of reversal, we had to await a final judgment.

We presume that the court will adhere to its rulings heretofore

made and affirm the judgments of the lower court, which are in strict accordance with its directions; still, it is our duty and pleasure to present again our views in the hope that the court may change its opinion.

1. The statute is violative of the State and Federal constitutions. An inspection of the tax laws shows that shares in railroads organized or doing business in Alabama were expressly exempted from taxation."

We make these quotations simply for the purpose of showing to the court our diligence in presenting the constitutional question to the courts of Alabama, which is now insisted upon.

It would make no difference, however, if the question involved had not been presented and urged upon the consideration of the lower court, for it arises under the second clause of section 709 of the Revised Statutes. It has been frequently held by this court that it is only where the right or privilege of immunity is claimed or arises under the third clause of that statute, that the point must be diligently asserted, and will not be reviewed for the first time in the Supreme Court. Where the point, however, draws in question the validity of a statute of, or an authority under the State on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity, the court will take notice of such rights, whether they are asserted in the lower court or not, because the decision of the case, no matter how it may be stated, necessarily involves the question.

Yazoo & Miss. R. R. Co. v. Adams, 180 U. S. 14.

Eastern Bldg., Etc., Assn. v. Welling, 181 U. S. 47.

Columbia Water Power Co. v. Columbia Electric St. Ry., 172 U. S. 475.

Willson v. Blackbird Creek Marsh Co., 2 Pet. 45.

Satterlee v. Matthewson, 2 Pet. 385.

The general doctrine that, in the imposition of public burdens in the way of taxation and in other legislation by the State affecting the rights of citizens, there must be no

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discrimination as to persons or classes which is purely arbitrary, oppressive or capricious, such as would be pure favoritism and a denial of the equal protection of the laws to the less favored persons or classes, is recognized in all the cases, of which there are a great many. We need to cite at present only four, since they recognize the principle and refer to all the authorities and considerations which govern in such cases. These cases are:

Gulf C. & S. F. R. Co. v. Ellis, 165 U. S. 150.

Magoun v. Ill. Trust & Savings Bank, 170 U. S. 293.

Nicol v. Ames, 173 U. S. 509.

Atchison, Topeka & S. F. R. R. Co. v. Matthews, 174 U. S. 96.

The last case cited particularly affirms the principle, both in the majority and dissenting opinion, and the authorities bearing upon the question are cited in each of these opinions. As stated in the case of Nicol v. Ames, *supra*, "The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural."

And, as stated in the case in 174, *supra*, p. 104, "The classification must proceed upon a substantial difference which has a reasonable relation to the object sought to be accomplished by the statute."

Thus, in the case last mentioned, the statute was held to be a police regulation to prevent fires and to require from railroads in the operation of their trains the observance of great caution. For this reason, the statute was upheld, whereas, in the case of Ellis in 165 U. S., *supra*, it having no such distinction to rest upon, the statute was declared void.

The statute impeached in this case is in the general revenue bill of the State. Its sole purpose is the collection of revenue, and is so declared in the opening clause. It is a taxation upon values, and not a privilege or license tax or

police regulation, so that the only question in this case is, whether in a general revenue bill, having for its sole object a taxation upon values, for general purposes of the State, it is allowable to tax A upon the value of his shares in railroads out of the State, and to exempt B on his shares in like railroads operating within the State. That there is classification in this case, no one doubts. The Supreme Court says that there is classification, and says that the State has a right to classify, and we admit that it has a right to classify. But the question still is, does the classification "proceed upon any difference which has a reasonable relation to the object sought to be accomplished;" "whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based on no real distinction and entirely unnatural."

We ask only two predicates for this argument, neither which can be denied: One, that this is a tax upon values; the other, that property which has a figurative domicil or venue for taxation is entitled to claim the same for protection. The constitution of the State and the statute itself say the tax is and must be in exact proportion to the value.

Value theoretically means, and practically is, the exchangeable estimate, after all deductions are made affecting the worth of an article. Thus, in the case of domestic shares, all proper deductions are made in the general market for taxes against such shares or against the corporate property. So, likewise, in the case of foreign shares, the market value represents the net worth after all like deductions. Value, thus, in every case, is a net result to the possessor, and simply indicates what the article commands in the market in cash. Two citizens, then, possessing respectively the same amount in value, one of domestic and the other of foreign shares, have the use and enjoyment of identically the same amount of net property of a like kind in every respect. Therefore, to exempt one of them from taxation, while the other is made to pay taxes, seems to fall directly within the inhibition of the XIVth amendment to the constitution

guaranteeing to every citizen the equal protection of the laws.

The Supreme Court of Alabama, in its opinion in 28 So. Rep. 482, attempts to justify this discrimination by saying:

"The exemption and likewise the distinction between the two classes of corporations could only have been inspired by the consideration that the burden certainly imposed by our laws on property of a corporation would indirectly diminish the value of its stock, while, in the case of the corporation having no property within its jurisdiction no such result could follow, except from foreign legislation over which this State has no control and for which it is in no way responsible."

We have but to overthrow this statement. It is the only vindication which can be set up of the statute in question.

The tax is imposed upon the owner of foreign shares upon the sole theory that such shares, by fiction of law, are located at the domicil of the owner. That is, they are within the jurisdiction of the taxing power. The very theory of taxation, therefore, hypothesizes A as the owner of foreign shares, and B. the owner of domestic shares, as both possessed of the same value of railroad stocks in the same taxing district. It would be monstrous, therefore, to tax one because, by fiction, his property was within the jurisdiction, and then discriminate against him upon the fact that his property was without the jurisdiction. The law must be consistent, at least so far as to be just.

Again, the court says that the classification and discrimination in taxation is justified upon the theory that the value of the domestic shares is supposed to be diminished by taxation of this State upon the corporate property, and that this would not be the case as to foreign shares except it be from foreign legislation. There are two prime objections to this argument: The first is, that in taxation the legislature can only look at *actual* values, and not at the *causes* of actual values. No matter what may be the causes of values, these causes if they diminish or increase the value, are self-

adjusting, since they leave for taxation in every case the net result after all deductions have been allowed on account of all causes affecting the value. Thus, there can be no injustice or double taxation in taxing domestic shares, though they were affected by taxation against the property of the corporation, since only the net value of the shares would be taxed after allowance for all such causes.

In the next place, the value of foreign shares has no advantage over domestic shares in being situated beyond the State, since the value of the shares in that case, as in the case of domestic shares, is a net result to the owner, irrespective of all particular causes influencing the value. So that the case in the abstract and in the concrete is this: Can B, the owner of shares actually within the State, be exempt from taxation, while A, the owner of foreign shares by fiction also within the State for purposes of taxation, is required to pay taxes upon the identical class of property? The case seems really too plain for argument.

In this case, the value may be supposed to be the same, the class of property identical, the residence of the owners the same, their duties to the State the same, and the sole difference for classification, exempting the one and taxing the other, that the income of the one owner is derived from the dividends of the local company, while the income of the other is derived from the foreign company. In other words, the statute makes the *situs* of the ownership of corporate property the same for taxation, and makes the *situs* different as a basis of discrimination against the owners of shares in foreign corporations.

The constitutional provision invoked in this case has never been construed to be any restriction upon the widest range of just taxation, but only of irrational and discriminating levies founded upon prejudice or other arbitrary rules. And such, we submit, is the case at bar. In taxing identical classes of property, value can only be viewed, and the ratio of taxation must be the same on the same valuation.

Whether the burdens that affect that valuation result from taxes to one commonwealth or another is a collateral and outside question.

Since the residue or actual value after all deductions are made, is the resultant property of the citizen alike in every case and, being of the same class of property, and by fiction for purposes of taxation supposed to be located within the taxing district accompanying the person of the owner, must be taxed or exempted without the arbitrary distinctions made by the statute in question. If foreign shares are present for taxation they are at the domicil of the owner for protection.

The State may not say "that all white men would be subjected to the payment of attorney's fees of parties successfully suing them, and black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any basis for the attempted classification. That must always rest upon the same difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." This is the language of the court in the case of Ellis, 165 U. S., *supra*.

In the case of State v. Loomis, 115 Mo. 307, it is said:

"Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus, the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

Any number of authorities may be cited for this principle, but it is a, b, c law to this court, and there is no need to pursue the question further. We simply say that A, possessed of a certain value in railroad shares and living in Alabama, and B, possessed of the same value of shares and living in the same State, can not be classed for taxation differently, simply because B's value is derived from ownership in domestic railroads, while A's is in foreign railroads. The legislature might as well tax people differently according to their diet. How would it do to tax B because he feeds on Kansas beef, and exempt A because he eats Alabama beef?

We believe it is insisted that the statute of 1897, above quoted as Section 3911 of the Code of 1896, does not really exempt shares of railroads, and thus that the tax covered by that statute is not open to the constitutional objection. This contention is founded upon the idea that clause 9 of the section referred to, in these words, "every share of any corporation organized under the laws of this State, or of any other State, or of the United States (other than railroad, telegraph, sleeping car companies, building and loan associations and banks or banking associations), to be assessed and collected in the county wherein such corporation has its chief or home office in this State and to be assessed at its actual market value in the name of the person in whose name such shares stand on the books of the corporation, and not to the corporation," simply exempts the shares referred to by way of exception, from the operation of that clause, while they are embraced in clause 14, which is in these words: "All other property, real or personal, not otherwise specified herein, including cotton, pig iron, manufactured goods and other things of value."

But this contention is untenable. The same tax is imposed upon all articles in each clause of the section. The clauses are for the purpose only of specifying the property

that is to be taxed. Shares of corporations are dealt with in two clauses of the section. In clause 8 the shares in banks and banking associations are dealt with. In clause 9 shares in other corporations are dealt with, the language being as above stated, "every share of any corporation organized under the laws of this State, or of any other State, or of the United States (other than railroad, telegraph, sleeping car companies, building and loan associations and banks or banking associations)." The last clause, clause 14, as it expressly says, is to cover only property real and personal "not otherwise specified herein," that is, not dealt with specifically.

The exemption in clause 9 of the particular shares embraced in the exception is an exemption from *the tax*, and not an exemption from a mere mode of collection specified in the clause of the taxes which are levied thereby. And the exemption is made as to railroads in consideration of the fact that by clause 12 a tax is levied on all property of railroads within the State; and as to other corporations, that there are also special taxes levied upon them. Beyond this, the Supreme Court of Alabama, in its decision upon this statute, concedes that there is an exemption, and attempts to justify it by saying that the exemption therein relates only to the shares of railroads and other corporations "having property subject to taxation here." The court further says:

"The exemption of these shares is doubtless for the reason that elsewhere special provisions are made for taxing the property and privileges of the last named corporations, which provisions could have no application to foreign corporations having no property and doing no business here. As to shares in them, we find nothing in either Code which should be construed as an exemption."

Thus, the Supreme Court admits the exemption of domestic shares from taxation, and insists upon the right to tax shares in foreign corporations doing no business in the State.

The question is thus stripped of every circumstance calculated to embarrass its consideration. The simple proposition is:

Whether the State of Alabama can, in a general revenue law, exempt from taxation its citizens who own shares of any given value in corporations having some taxable property in the State, and at the same time tax its citizens who own the like shares in like corporations that have no taxable property within the State.

We submit that a classification founded on such distinctions falls strictly within the inhibition of the constitution. Citizens have a right to buy and own all vendible property, and when fiction gives it a situs with the domicil of the owner for purposes of taxation justice retains the situs for protection. The question then really is: Can A and B, owning property of the same kind and value and of the same situs, be taxed differently by any classification founded merely on historical data respecting their property?

And this question is in effect decided by the Supreme Court of Alabama in the case of State Bank v. Board of Revenue, 91 Ala., 223, where the Court says shares in State banks and in National banks belong to the same class for taxation, and that any attempt to draw a distinction between them as subjects of taxation would be futile. Certainly, if State banks and National banks belong to the same class it is clear that shares in railroads belong to the same class, though they are chartered by different States.

Before concluding, we notice one or two cases much relied upon by appellee.

One is Pacific Express Co. v. Seibert, 142 U. S., 339. This case was one in which it was insisted, that it was an arbitrary distinction to class as express companies persons or corporations who carry on the business of transportation on contracts for hire with railroad or steamboat companies, and tax their business and not tax by the same rule persons and

corporations doing an express business with their own property.

The court very clearly shows, on pages 353–4, that the legislation in question was not an invidious discrimination, but was founded on an "essential difference between express companies as defined by this act and railroad or steamboat companies or other companies that own their own means of transportation"—the distinction being that railroad companies pay taxes on their property, as well as generally upon their franchise, while express companies as defined by the act could be reached only by a tax "upon their receipts for business transacted," the Court saying that "in the nature of things, and irrespective of the definitive legislation in question, they belong to different classes."

The case affirms the exact principle here contended for and makes the precise distinction recognized in all the cases, viz: That classification for taxation must be founded, as expressed in Atchison, etc. v. Mathews, 174 U. S., 96, on some "substantial difference which has a reasonable relation to the object sought to be accomplished by the statute." In the case at bar, revenue is the declared object of the statute—and value is the basis of taxation. Shares in railroads belong to the same class—they may be supposed identical in value—and both located in the same taxing district, by being attached to the domicil of the owner. How, then, can the legislature look into the history of the shares and class shares in foreign corporations having no property in this State for taxation and exempt shares in domestic railroads? Such a distinction has no relation to the object of the statute. The decision of the Supreme Court of Alabama in the case at bar says that "the ownership of shares in capital stock is distinct from ownership of capital stock itself." 28 So. Rep. 482. And there can be no question that this distinction is correct.

New Orleans v. Houston, 119 U. S., 265, 277.
Gibbons v. Mahon, 136 U. S., 549.

Van Allen v. Assessors, 3 Wall. 573.
Farrington v. Tennessee, 95 U. S., 679, 687.

The domicil of the railroad therefore can not justify any discrimination against individual owners of the shares.

Another case is American Sugar Refining Co. v. Louisiana, 179 U. S., 89. In that case it was claimed that sugar refineries could not be taxed because there was an exemption in favor of "planters and farmers grinding and refining their own sugar and molasses." The Court shows that the discrimination was founded on a reasonable distinction in principle. That farmers and planters who simply put their products in condition for the market could be classed differently from those persons in the business of refining generally. This case bears a great similarity to the case of Seibert in 142 U. S. above noticed. And we refer to it and the instances and authorities mentioned in the opinion as fully sustaining the contention of the plaintiff in error.

We find no opinion of any of the judges who have ever been members of this Court which contains any expression which can legitimately be made to sustain the tax in this case.

W. A. Gunnels